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## Appendix B

# State Law

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Selected portions of Delaware State law from Title 29, Chapter 69, "The State Procurement Act" that apply to the procurement of professional services are quoted in this Appendix.

### "Subchapter I. General Provisions

#### §6902. Definitions.

(a) 'Agency' means every board, department, bureau, commission, person or group of persons or other authority which directly receives monies under any budget appropriation act or supplemental act and.....

(b) 'Agency Head' means the top official in an Agency whether elected, appointed or otherwise. the Agency may delegate duties under this Act to a designee within the Agency.

(c) 'Agency Official' means any employee, consultant, person in the category of other personal service or any other person receiving compensation from the State, its agencies, municipalities, political subdivisions or school boards.

(d) 'Compensation means the total amount paid by an Agency for professional services, including reimbursed expenses, unless otherwise stated in the contract.

(i) "Firm" means a person, organization, partnership, limited partnership, corporation, association non-profit agency or other business association.

(l) 'Professional services' means services which

generally require specialized education, training or knowledge and involve intellectual skills. Examples of professional services include but are not limited to engineering, environmental engineering, environmental monitoring, land surveying, landscape architecture, geology, architectural, archaeologists, architectural historians, educational consultants, management, medical, teaching, planning, computer information management, financial, accounting, auditing, construction management, and arbitration services.

#### §6903. Violations and Penalties

(a) Any person, who, with intent to avoid compliance with this Act, willfully fragments, or subdivides any contract for the purchase of material, non-professional services, public works or professional services, shall be subject to the penalties listed in this Section.

(b) Agency employee and representatives shall neither seek nor accept for themselves or others any gifts, favors, entertainment or privileges from any vendor or supplier who does or seeks to do business with any Agency.

(c) Each contract entered into by an Agency for professional services shall contain a prohibition against contingency fees as follows:

(1) The firm offering professional services swears that it has not employed or retained any company or person, working primarily for the firm offering professional services, to solicit or secure this agreement, by improperly influencing the Agency or any of its employees in any professional service procurement process; and

(2) The firm offering the professional service has not paid or agreed to pay any person, company, corporation, individual or firm, other than a bona fide employee working primarily for the firm offering professional services, any fee, commission, percentage, gift or any other consideration contingent upon or resulting from the award or making of this agreement; and

(3) For the violation of this provision, the Agency shall have the right to terminate the agreement without liability and, at its discretion, to deduct from the contract price, or otherwise recover, the full amount of such fee, commission, percentage, gift or consideration.

(d) Any Agency official who offers to solicit or secure, or solicits or secures, any Agency or central contract and, is paid any fee, commission, percentage, gift or any other consideration, shall be subject to the penalties listed in this Section.

(e) Any individual or firm who offers, agrees, or contracts to improperly influence any Agency or its employees in the procurement of any Agency or central contract and, who is paid or is to be paid a fee, commission, percentage, gift or any other consideration contingent upon or resulting from the award or the making of an Agency or central contract, shall be subject to the penalties listed in this Section.

(f) Any individual or firm offering material and/or services which shall offer to pay, or is paid, any fee, commission, percentage, gift or any other consideration contingent upon, or resulting from, the award or making of any Agency or central contract shall be subject to the penalties in this Section.

(g) Except for §6960 of this Title for which the penalties and remedies enumerated in this Section shall apply, any individual or firm which commits a violation of this Act, as listed in this Section, shall be punished by a fine not less than \$1000 and not more than \$2,000, or by imprisonment for not more than 6 months, or both, and upon a second or subsequent conviction thereof, shall be punished by a fine of not less than \$2,000 and not more than \$5,000, or by imprisonment for not more than a year, or both. The Superior Court for the State shall have exclusive original jurisdiction over

offenses listed in this Section.

(h) The remedies and penalties provided for in this Section are not exclusive and shall be in addition to any other procedures, rights or remedies which exist with respect to any other provisions of law including but not limited to State and/or federal criminal prosecutions, or common law or statutory actions brought by private parties and/or the provisions and penalties defined in Chapter 58 of this Title.

### **§6907. Emergency Procedures and Critical Need for Professional Services**

(a) An Agency Head may waive any or all provisions of this Act to meet the critical needs of the Agency as required by emergencies or other conditions where it is determined to be in the best interest of the Agency. The Agency Head may determine an emergency condition exists by reason of extraordinary conditions or contingencies that could not reasonably be foreseen and guarded against. An emergency condition.

(b) In addition to the waiver provisions provided for in subsection(a), an Agency Head may waive any or all provisions of Subchapter V of this Title, to meet a critical need of the Agency as required by an emergency or other condition where it is determined to be in the best interest of the Agency. The Agency Head may determine a critical need exists by reason of conditions or contingencies that could not reasonably be foreseen or guarded against. A critical need creates a need for professional services that cannot be met through normal procurement methods.

(1) Any procurement pursuant to this Subsection shall be limited to those professional services necessary to satisfy the critical need.

(2) A copy of each critical need determination processed under this procedure shall be kept on file by the Agency.

## **Subchapter V. Professional Services**

### **§6980 Small Professional Services Procurement Process**

Any State contract for which an Agency is a party with probable fees, including reimbursable expenses and amendments, less than the threshold amount(s) established by the Contracting and Purchasing Advisory Council pursuant to §6913 of this Act for the completed job will be subject to the provisions of §6983(e) and §6985. but shall be at the excluded from all other portions of this Subchapter. Agencies may alternately, at their discretion, procure services which include material other than professional services in accordance with §6924 of this Act.

### **§6981. Large Professional Service Procurement Process**

Any State contract for which an Agency is a party with probable fees, including reimbursable expenses and amendments, greater than the threshold amount(s) established by the Contracting and Purchasing Advisory Council pursuant to §6913 of this Act for the completed job will be subject to the provisions of this Subchapter. Agencies may alternately, at their discretion, procure services which include material other than professional services in accordance with §6924 of this Act.

(a) Each Agency shall publicly announce, not less than once a week for 2 consecutive weeks in a newspaper published or circulated in each County of the State, when professional services are required except:

(1) In case of critical needs so certified pursuant to §6907 of this Title; or

(2) Where professional services are determined by the Agency to be necessary during the course of completion of a previously awarded contract; and

a. The Agency determines that it would be in the best interest of the State to procure such additional or supplemental professional services from a firm already under contract for which the supplemental and additional professional services are required; and

b. Such additional or supplemental professional services are within the scope of contract.

(b) Such announcement shall include;

(1) The project identification;

(2) General description and scope of the project;

(3) Location;

(4) Deadline for submission of brief letters of interest;

(5) Criteria for selection of professionals including any special criteria required for any particular project;

(6) Indication of how interested professionals can apply for consideration;

(7) The Agency's intention to award to more than one firm, if applicable;

(8) A description of the selection process to be used, as defined in Section 6982 of this Title.

(c) Additional advertising shall be at the discretion of the Agency.

(d) Each Agency shall establish written administrative procedures for the evaluation of applicants. These administrative procedures shall be adopted and made available to the public by each Agency before publicly announcing an occasion when professional services are required. One or more of the following criteria may be utilized in ranking the applicants under consideration:

(1) Experience and reputation;

(2) Expertise (for the particular project under consideration);

(3) Capacity to meet requirements (size, financial condition, etc.);

(4) Location (geographical);

(5) Demonstrated ability;

(6) Familiarity with public work and its requirements; or

- (7) Distribution of work to individuals and firms or economic considerations.

(e) In addition to the above, other criteria necessary for a quality, cost-effective project may be utilized.

(f) Each project shall be given individual attention, and a weighted average may be applied to criteria according to its importance to each project.

(g) For the selection process described in Section 6982(b) of this Title, price may be a criteria used to rank applicants under consideration.

### **§6982 Selection.**

(a) Agencies shall use the selection process described in paragraph (1) through (5) in this subsection (a) for those professional services within the scope of the practice of architecture, professional engineering, including but not limited to environmental engineering, consulting and environmental monitoring, professional land surveying, construction management, landscape architecture and geology as defined and authorized by the laws of the State or those services performed by persons engaged in the above-mentioned professions in connection with their professional employment or practice.

(1) Based upon the criteria established pursuant to §6981(d) of this Title, the Agency shall rank in order of preference the applicants deemed to be qualified to perform the required services.

(2) Beginning with the qualified firm designated on the preference list, the Agency shall negotiate for professional services at compensation which the Agency determines is fair and reasonable. The Agency shall conduct an analysis of the cost of the professional services required, in addition to considering their scope and complexity. Fee proposals shall not be solicited from this or any other firm on the preference list for use in comparison of fee negotiations. The Agency may require the receiving the award to execute a truth-in-negotiation certificate stating the wage rates and other factual unit costs supporting the compensation are accurate, complete and current at the time of contracting. All professional service

contracts shall provide that the original contract price and any additions thereto shall be adjusted to exclude any significant sums where the Agency determines the contract price was increased due to inaccurate, incomplete or non-current wage rate and other factual unit costs. All such contract adjustments shall be made within one year following the end of the contract.

Should the Agency be unable to negotiate a satisfactory contract with the qualified firm designated to be first on the preference list, at a price the Agency determines to be fair and reasonable, negotiations with that firm shall be formally terminated. The Agency may negotiate with the remaining firms by order of ranking. At any point in the negotiation process the Agency may, at its discretion, terminate negotiations with any or all firms.

(4) After accomplishing the evaluation and conducting discussions and negotiations, the Agency shall select 1 applicant and prepare a public notice within 10 days after awarding the contract stating the firm selected. This notice will appear in a Statewide news publication or by letter to all applicants. If the Agency has elected to select multiple firms, the Agency shall continue the selection process by negotiating with the next firm on the preference list. This process shall be continued until the required number of vendors have been selected.

(5) It shall be the responsibility of the professional services firm to be current with any professional registration or certification as required by law.

(b) For all professional services not described in Subsection (a) herein, Agencies shall use the selection process described in paragraphs (1)-(5) in this Subsection (b).

(1) Based upon the criteria established pursuant to §6981(d) of this Title, the Agency shall determine all applicants that meet the minimum qualifications to perform the required services.

(2) The Agency shall then interview at least one of the qualified firms. The Agency may negotiate with one without terminating negotiations with another firm and may negotiate with one or

more firms during the same period. At any point in the negotiation process, the Agency may, at its discretion, terminate negotiations with any or all firms.

(3) The Agency may require the firm with whom the Agency is negotiating to execute a truth-in-negotiation certificate stating the wage rates and other factual unit costs supporting the compensation are accurate, complete and current at the time of contracting. All professional service contracts shall provide that the original contract price and any additions thereto shall be adjusted to exclude significant sums where the Agency determines the contract price was increased due to inaccurate, incomplete or non-current wage rates and other factual unit costs. All such contract adjustment shall be made within one year following the end of the contract.

#### **§6984. Administrative Provisions**

In case of any contract entered into by an Agency other than any county of this State and other than a public school district, and which is not excluded under §6980 and/or §2981 of this Subchapter, no contract shall be executed unless and until the firm has provided the Agency with its taxpayer identification number (i.e. federal employer identification number or social security number) or its Delaware business license number and within fifteen(15) days of the time identification of any subcontractor shall be required or at the time the contract is executed, whichever, is later, the number of such subcontractor. The Agency shall report to the Division of Revenue each firm and subcontractor under this Subsection unless the Director of the Division of Revenue notifies the Agency of criteria according to which, in the Director's discretion, reporting is not required, and the contract meets such criteria.

#### **§6985 Sole Source Procurement**

(a) A contract may be awarded for Professional Services without competition if the Agency Head, prior to the procurement, determines in writing that there is only one source for the required professional service. Sole source procurement shall not be used unless there is sufficient evidence that there is only one source for the required professional service and that no other type of

professional service will satisfy the requirements of the Agency. The agency shall examine cost or pricing data prior to an award under this Section. Sole source procurement shall be avoided, except when no reasonable alternative sources exist. A written determination by the Agency on the basis for the sole source procurement shall be included in the contract file.

(b) An Agency seeking a sole source procurement shall prepare written documentation citing the existence of a sole source condition. The document shall include the specific efforts made to determine the availability of any other source and an explanation of the procurement need. The Agency may, for confirmation, submit the documentation to the Division of Purchasing for review and comment prior to the intended date of award.

(c) The Agency shall negotiate with the single supplier, to the extent practicable, a contract advantageous to the Agency. The Agency shall enter into a formal contract stating the terms and conditions of the procurement.

#### **§6986. Multiple Source Contracting**

An Agency may award a contract for a particular professional service to 2 or more firms if the Agency Head makes a determination that such an award is in the best interests of the State. If such a determination is made, the advertisement shall include a notification of the right of the Agency to make such an award and the criteria upon which an award will be based.